No. 13090

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY, a corporation,

Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,

Appellees.

BRIEF OF APPELLANT.

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Jurisdiction.

This action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, and removed by appellant to the United States District Court, Southern District of California, on the grounds of diversity of citizenship under Title 28, Section 1441 U. S. C. Said action was within the original jurisdiction of said Court, the amount in controversy being in excess of $3,000.00 exclusive of interest and costs, the plaintiff being a citizen and resident of the State of California, and the Defendant being a citizen and resident of the State of Connecticut and a non-resident of the State of California. (Title 28, U. S. C., Sec. 1332.)

The cause comes within the usual appellate jurisdiction of this Court upon appeal from final judgment in actions at law as provided in Title 28 U. S. C., Section 1291.

Statement of the Case.

This action is a suit at law wherein Appellees sought and recovered judgment against Appellant in the sum of $14,450.00 upon an insurance contract.

The undisputed facts show that on December 1, 1948, Appellant executed and delivered to Appellees its contract of insurance effective for three years in the amount of $10,000.00, subsequently increased to $15,000.00. The contract was in the form provided by California statutes for fire insurance policies and contained endorsements by which, to quote the language of the policy, Appellant insured Appellees as follows, "the coverage of this policy is extended to include direct loss by * * * explosion, * * *." [Ex. A to Complaint, Tr. pp. 12-16.]

The policy also contained the following statutory provisions:

> "When a loss occurs the insured must give this company written notice thereof without unnecessary delay; * * *
>
> "Within sixty days after the commencement of the fire [the word 'explosion' substituted for 'fire' by the endorsement, Tr. 15] the insured shall render to the Company at its main office in California named herein preliminary proof of loss consisting of written statements signed and sworn to by him setting forth" (here follows various matters to be included in said proof). [Tr. p. 13.]

Appellees commenced this action against Appellant to recover upon this contract of insurance, alleging as follows:

> "On or about December 19, 1949 plaintiffs suffered direct loss to said property so insured by said policy of insurance caused by perils insured by said policy of insurance. Said direct loss was caused by explosion occurring in said building so insured and from hazards inherent therein, and resulted in the rupture or bursting of water pipe which was a part of the insured building and caused the reinforced concrete slab forming a part of said (10) building to be deformed and cracked and caused the door and window frames, floors and plaster of said building to be cracked, deformed and damaged and by reason thereof said property so insured by said policy of insurance, and plaintiffs were damaged in the sum of $14,450.00. Said loss and damage was not caused by explosion originating within steam boilers, steam pipes, steam turbines, steam engines or fly wheels and was not caused by explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines or fly wheels." [Complaint, Tr. p. 8.]

Appellees also alleged that they had performed all the terms, covenants, and conditions of said insurance policy, as so endorsed, on their part to be performed [Tr. p. 10, fol. 11] and also alleged:

> "On or about December 21, 1949, plaintiffs notified defendant of said loss by reporting the same to said

Hamman & Avery, as agent of defendant, and at said time plaintiffs inquired of said agent as to whether or not any action was required of plaintiffs under said policy of insurance. Said Hamman & Avery, acting as agent for defendant, at said time, informed plaintiffs that said loss was not covered by said insurance policy and that defendant was not obligated, under the terms of said policy of insurance, to indemnify plaintiffs for said loss or any part thereof. Plaintiffs believed and relied upon said statement of said Hamman & Avery and believing and relying thereon, plaintiffs refrained from filing Proof of Loss under said policy of insurance or taking any further action thereon until after the expiration of more than sixty days after December 19, 1949. Plaintiffs did not discover that said loss was covered by said policy of insurance until after the expiration of more than sixty days after said loss." [Tr. p. 9.]

On issues joined on these allegations trial was had and the Court made findings and conclusions and rendered judgment against Appellant in the amount of $14,450.00, with interest and costs. [Tr. p. 30, fol. 31; p. 37, fol. 39.]

Appellant filed notice of appeal to this Court within the statutory time. [Tr. p. 37, fol. 39.]

Appellant presents this appeal upon the premise that the undisputed facts established that there was no direct loss to the property insured caused by explosion, and that Appellees failed to perform the conditions precedent of said contract of insurance.

Summary of Facts.

At the time in question, Appellees were the owners of a newly constructed bungalow in the Ranch Los Palos Verdes, Los Angeles County, California, being the building described in the policy of insurance. This was a one-story, rambling, bungalow-type of building of about nine rooms and three bathrooms, and had been completed and occupied only a few months before the event which gave rise to this suit occurred. It was built over adobe soil on a cement slab with wooden frame covered by redwood. Roughly, the house was constructed first by pouring the perimeter walls, then grading within, next placing crushed rock, either in or on top of which the water system was laid, then placed unsealed building paper over the crushed rock and then pouring the concrete slap. In the concrete slap were imbedded copper coils for the purpose of providing a radiant heating system, and over this slab was laid the oak flooring of the house, and underneath certain of the oak flooring were also layers of pipe, for radiant heat, on top of the slab.

The house was served by one main water supply and the water came into the house from a main supply through a reduction valve which reduced the pressure to around 45 pounds. The water came into the house through water softener tanks and the particular portion of the system involved here continued thence in a straight line for a distance of approximately twenty feet to a T joint and beyond. At the T joint, at right angles, the water pipe continued for about ten feet to a hot water heater. This pipe was a ¾ inch wrought iron galvanized pipe and was laid on or in the crushed rock, over which crushed rock there was layed a paper membrane and over that the slab poured. [Pltf. Ex. 1, Tr. pp. 45-46, 72-82.]

There were two other hot water heaters in the house, one for heating domestic water and which is not involved here, and one for heating the water supply for the radiant heat.

On Sunday morning, December 19, 1949, at about 7:00 A. M. Appellee Esli Daniels was awakened in his bedroom, about fifty or seventy-five feet from the hot water heater just mentioned, by an unusual noise in the boiler room housing this heater. [Tr. p. 49, fol. 9.] He ran to the heater room where the radiant heat and water boilers were and the water boiler was going full blast and making an unusual noise, a noise hard to describe but very similar to that that you hear in your car radiator when your car is overheated. It was a type of noise like that. [Tr. p. 50, fol. 10.]

The gas burner under the hot water heater was burning very vigorously and he turned the gas off. [Tr. p. 50, fol. 10.]

He immediately went into the bathroom adjacent and turned on the hot water tap there. Steam came out with a lot of pressure, enough pressure to blow out a little copper strip that was in the faucet to prevent splashing. He then went into the kitchen and turned that hot water line on and steam also came out of that and a little water. [Tr. p. 51, fol. 11.]

The steam did not issue from the hot water faucet in the bathroom very long, the witness would guess ten minutes, but didn't know, maybe it was only two or three, but it wasn't very long, just a short time. After that no water came at all from the hot water faucet. [Tr. p. 52, fol. 12.] The witness concluded the thermostat on the hot water heater wasn't working because the water was overheating. [Tr. p. 53, fol. 14.]

On Sunday night they heard a noise that sounded like one of the outside water taps was running; just like water was running someplace in the house and they couldn't find it. [Tr. p. 74, fol. 49.]

All this occurring on Sunday, no plumber came until about three or four o'clock Monday afternoon, December 20th. The plumber then turned the water off and removed the water softeners because it sounded like water was running in the water softener and there was water on the floor around the water softener. [Tr. p. 55, fol. 16.]

On Tuesday, December 21st, plumbers came to the house, located the difficulty, which was found to be a break in the ¾ inch wrought iron, galvanized water line at the T joint where the line took off at right angles to convey cold water to the hot water heater about ten feet distant. [Pltf. Ex. 1, Tr. p. 81, fol. 73.] This break was at the threaded portion of the pipe where the pipe entered the T joint and was in the last engaged thread in the fitting. It was a square break, as reasonably as could be made on a piece of pipe, and there was between the ends of the pipe about an eighth or a quarter of an inch separation. [Tr. p. 81, fol. 74.] The two broken ends of the pipe were in opposition but seemed to be slightly out of alignment. [Tr. p. 85, fol. 107.] The break was at right angles along the angle with the thread and was a clean break, but not like you would cut it with a saw. There was a slight amount of jaggedness that you would find if a pipe was broken, but there was no undue amount of jaggedness. It appeared to be an ordinary break that you would find in any threads. [Tr. p. 87, fols. 108-109; p. 141, fol. 372.]

This break was repaired by putting in an expansion swing joint and the Appellees' water service reestablished.

Following the reestablishment of services and within twenty-four or forty-eight hours thereafter, damage began to appear in Appellees' house. They first noticed steam causing the floors to swell and buckle and then distortion of the slab which resulted in general distortion throughout the place. The steam was caused by the dampness introduced in the flooring from the water that had been flowing under the house from Sunday morning until Monday afternoon and the heating from the radiant heating unit producing steam and also from the swelling of the adobe soil under the crushed rock and concrete slab.

None of the foregoing facts are in dispute and the foregoing statement, we believe, constitutes a recitation of all of the material testimony relating to the happening which Appellees claimed constituted the direct loss by explosion provided for in the policy.

The only dispute in the case came, as is usual, in the opinion of experts. Appellees produced one expert who deduced from the foregoing facts the conclusion that when the Appellee opened the hot water tap it produced the phenomena known as "water hammer" and the force of this phenomena broke the pipe in the manner described by the witness.

Appellant produced a number of highly qualified experts who testified that the break in the pipe could not have been caused by internal pressure or by water hammer and all of whom concluded that the break in the pipe occurred through external tension, probably due to the swelling of the adobe soil due to recent heavy rains. However, the District Court, as a trier of fact, having found and concluded that the break of the pipe was caused

by internal pressure, Appellant fears that it is concluded by this finding and will discuss this phase no further, but direct ourselves to the presentation of the proposition that the occurrence and resulting damage was not direct loss by explosion.

Following the occurrence and the damage, Appellees failed to give Appellant written notice thereof without unnecessary delay and failed to comply with the policy conditions by rendering sworn proof of loss within sixty days after the commencement of the loss, not notifying Appellant of any claim until April of 1950 and not filing a proof of loss until July 31, 1950. The Court found a compliance with all the conditions of the policy, which finding obviously was erroneous, and also found a waiver thereof. As to the question of waiver, we believe the facts from which waiver was claimed can better be presented in the argument than in the summary.

Specifications of Error.

1. The Court erred in deciding and finding that Appellees suffered direct loss to their property by explosion occurring in the building insured.

2. The Court erred in finding that Appellees had performed all the terms, covenants and conditions of said policy on their part to be performed.

3. The Court erred in impliedly finding that the Appellant had waived performance by Appellees of the conditions precedent above referred to.

ARGUMENT.

The fundamental proposition involved herein is whether there was a direct loss by explosion.

Appellees sued Appellant upon a written instrument, the only condition of which they contend authorizes them to recover is the insurance of Appellees by Appellant against a direct loss by explosion. Appellant submits that there is absolutely no testimony, either direct or theoretical, by which these undisputed facts can be tortured into making the event that occurred an explosion.

There is no place for construction of this contract. The language is of the simplest. "The coverage of the policy is extended to include direct loss by * * * explosion * * *." In applying the word "explosion" to a set of facts, the word is to be taken as understood by an ordinary person in its ordinary and popular sense.

In the case of *Roma Wine Company, Inc. v. Hardware Mutual Fire Ins. Co.,* 31 Cal. App. 2d 455, 88 P. 2d 260, the Court said:

> "In *New Hampshire Fire Ins. Co. v. Rupard,* 187 Ky. 671 (220 S. W. 538), it is said:
>
> " 'The appellants insist that all the evidence is to the effect that the inflammable gas in the room was ignited by the flames of the match, and that its burning therein for a short space of time before the noise and effect of the explosion occurred was only a part of the explosion, and hence that the burning of the floor, fixtures, papers, boxes, and clothing before the culmination of the explosion was a fire subsequent, and not antecedent, to the explosion. However well this theory may accord with scientific principles as applied to such an occurrence, it is not in accord with the commonly accepted opinion of what

constitutes an explosion. Ordinary people other than scientists would hold that the explosion occurred when the sudden expansion took place which wrecked the building, accompanied by a more or less loud report. In *Mitchell v. Potomac Ins. Co., supra* (183 U. S. 42 (22 Sup. Ct. 22, 46 L. Ed. 74)), the word "explosion" as used in an insurance policy was defined to be what ordinary men, not scientists, understood an explosion to be, and this view of what the term in a policy of insurance is intended to mean is concurred in generally.'

"In *Mitchell v. Potomac Ins. Co.,* 183 U. S. 42 (22 Sup. Ct. 22, 46 L. Ed. 74), the court said:

"' "When the word 'explosion' was used in the policy, the company as ordinary men, . . . and the party insured as an ordinary man, are presumed to have understood the word 'explosion' in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word." ' "

The foregoing cited case is the only California case where we have found a decision on what constitutes an explosion. There have been numerous expressions from other courts and dictionaries, all more or less to the same effect.

Hartford Fire Ins. Co. v. Empire Coal Min. Co., 30 F. 2d 794, follows the rule laid down in the above-quoted case, and quotes the various definitions as follows:

"The term 'explosion' has a varied meaning. Webster's Dictionary defines it as 'a violent bursting or expansion, with noise, following the sudden pro-

duction of great pressure, as in the case of explosives, or a sudden release of pressure, as in the disruption of a steam boiler.'

"Century Dictionary defines it as 'a sudden expansion of a substance, as gunpowder or an elastic fluid, with force and usually a loud report; a sudden and loud discharge.'

"The New English Dictionary (Oxford) gives this definition, 'of a gas, gunpowder, etc.: the action of "going off" with a loud noise under the influence of suddenly developed internal energy.'

"In United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 348, 10 Am. Rep. 735, it was said: 'An explosion may be described generally, as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard, or accurate measurement, but by the common experience and motions of men in matters of that sort.'

"In Trans. F. Ins. Co. v. Dorsey, 56 Md. 70, 81, 40 Am. Rep. 403, it was said: 'An explosion produced by ignition, according to common understanding, may be accurately enough described, for practical purposes, as a sudden and rapid combustion, causing a violent expansion of the air, and producing a report more or less loud, according to the resistance offered. That it greatly varies in its degrees of violence, and the effects produced, are facts fully within the experience of every one. We must suppose that the

term was employed in the policy in its ordinary and popular meaning.'

"In Michell v. Potomac Ins. Co., 16 App. D. C. 241, 270, it was said, quoting from the Dorsey Case, *supra:* '* * * An explosion * * * according to common understanding, may be accurately enough described for the practical purposes as a sudden and rapid combustion causing a violent expansion of the air and producing a report more or less loud.' "

Applying the true meaning of the word "explosion" as used in the contract of insurance to the undisputed facts, we find that the breaking of the water pipe had not a single one of the elements of an explosion as is ordinarily understood and applied.

No noise was heard other than a noise like the hissing of steam in the hot water boiler. No shattering occurred, the pipe breaking off sheer and at right angles as would be the case under any ordinary tension. There was no sudden expansion of any substance, as the witnesses testified that water is incompressible. There was no violent expansion of air or of any other substance. There was no report at all, either loud or otherwise.

If we accept the theory of Appellees' one expert that the opening of the hot water tap produced a water hammer and this water hammer broke the pipe, we have then only the effect of a hammer, which pounding on the T joint broke the pipe which was broken at right angles sheer with no fragmentation or shattering such as must be present in an explosion. No one would contend that if the pipe had been subjected to a pounding by a hammer, water or otherwise, that this would be an explosion.

If we test these facts by the definitions announced in the foregoing cited cases and apply the word explosion in the ordinary and accepted sense used by ordinary men in their ordinary nomenclature, as is the rule, it would seem that a very fair test of whether or not this series of events constituted an explosion would be found in the very fact that, although, Appellees, their friends, and advisors, were fully aware of all the facts and circumstances surrounding the occurrence on December 19, 1949, and immediately thereafter, none of them considered that there had been an explosion.

It was not until April, 1950, when Appellees' attention was called to the case of *Olds Seed Company v. Commercial Union Assurance Company,* hereinafter discussed, that Appellees gave Appellant notice that they had sustained a loss by explosion and immediately got busy to shape their case within the terms of the *Olds* case, and it was not until July 31, 1950, more than six months after the alleged loss, that they served sworn proofs of loss upon Appellant as required by their contract.

Appellees relied upon, and will no doubt rely upon in this Court, the case of *Olds Seed Company v. Commercial Union Assurance Company,* 175 F. 2d 472 (C. C. A. 7th).

This case is the only case Appellants have found and we believe it is the only case in existence where an alleged explosion had occurred in a water pipe and this case goes to the extreme limit. It must be pointed out that that case was a jury trial and no exceptions were taken to the

instructions given by the Court regarding explosions, and that the Appellate Court indicated, although not deciding, that as triers of fact they perhaps would have come to a different conclusion when they said, on page 474,

> "The question before us is not what conclusions we would have reached from the evidence, had we been members of the jury."

The facts in the present case, however, do not bring themselves at all within the facts of the *Olds* case, or within any of the definitions or conceptions of the meaning of explosion as defined therein, or in any of the other cases or dictionaries which we have been able to find. In the *Olds* case the conclusion was drawn that there was an explosion from the condition of the pipe. In that case the pipe was found to have a jagged edged break about two and a half inches in length along the longitudinal axis of the pipe and the sides of the break were about half an inch apart at the widest point of separation. In the present case the pipe was not shattered, jagged edged, or broken longitudinally, but was a sheer, clean break at the last thread joining it to the T. In the *Olds* case, the presumed explosion occurred at a time when no one was present to hear the report of the explosion, a report being one of the essential ingredients of an explosion. In our instant case, Appellee, Esli Daniels, and his son were both in the immediate vicinity of where the pipe broke and heard no report or other sounds other than the sound like the escaping of steam in an automobile radiator.

Appellant submits that this is a case where the minds of men cannot reasonably disagree on the conclusions to be drawn from the facts and where the facts are wholly undisputed and that the trial court erroneously concluded that the break in the water pipe, an explosion and the damage to Appellees' property was direct loss by explosion.

Assuming, for the sake of argument, that the break in the pipe was caused by explosion, the damage did not arise direct from that. This was only a remote cause of the loss. When the pipe broke, nothing in the way of damage occurred. Nothing happened except that water commenced to seep in under the slab floor and dampen the concrete so that when the radiant heater heated up the house, the moisture and steam took effect and later when the adobe soil commenced to swell from the presence of water it rose and buckled the concrete slab and thereby distorted and damaged the house. Had Appellees turned off the water within a reasonable time after the pipe broke there would have been no damage other than a little moisture under the house. The breaking of the pipe was only a remote cause of the loss.

> "An insurer is liable for a loss of which the peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."
>
> Cal. Insurance Code, Sec. 530.

Error of the Court in Making Findings VIII, IX, and XII, Finding in One Paragraph That Appellees Had Performed the Conditions Precedent and in the Others Impliedly Finding a Waiver Thereof.

The contract of insurance sued upon herein contains the following statutory provisions:

> "DUTY OF INSURED IN CASE OF LOSS. When a loss occurs the insured must give to this company *written notice thereof without unnecessary delay;* * * *
>
> "Within sixty days after the commencement of the fire the insured shall render to the company *at its main office in California named herein* preliminary proof of loss consisting of a *written* statement signed and sworn to by him setting forth:—(here follows eight specifications of matters required). * * *
>
> "No suit o raction on this policy for the recovery of any claim shall be sustained, *until after full compliance by the insured with all of the foregoing requirements,* nor unless begun within fifteen months next after the commencement of the fire." [Italics ours; Tr. p. 13.]

The rule in this jurisdiction, and by the great weight of authority elsewhere, is and always has been that where a contract of insurance contains the provisions quoted above, that the performance of those conditions are, unless waived, conditions precedent to the right of maintaining an action and that a plaintiff cannot recover unless he can show that he has performed the conditions in the manner and within the time provided. This rests upon the fundamental proposition that a party suing upon an agreement must bring himself within the terms of the

agreement, and show that he has performed the conditions of the agreement upon his part agreed to be performed.

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231.

The leading case in California involving the direct proposition of the furnishing of proofs of loss within sixty days after the loss is the case of *White v. Home Mutual Ins. Co.,* 128 Cal. 131, 60 Pac. 666. This case frequently has been cited and followed and has never been overruled. On pages 135 and 136 of 128 Cal. (pp. 66-67 of 60 Pac.) the Court lays down the rule as follows:

> "The policy by direct words says proofs of loss must be furnished within sixty days from the date of the fire. This is the contract between the parties. The period of time provided allows ample opportunity to do the work, and the provision is a most reasonable one. If this requirement of the contract is binding to any extent, if it is binding upon the insured to furnish the proofs of loss, then why is it not equally binding upon him to furnish proofs within sixty days? Why should one provision of the requirements be given effect, and not the other? It is not for this court to say that the one provision holds any more of substances than the other. It is conceded by the Michigan court in all its cases that the proofs must be furnished before the action can be brought, and it seems equally clear that they should be furnished within the time specified, or likewise action cannot be brought. As the court has already shown, the great weight of authority is in direct line with these views. The contract is, that the action cannot be brought until after a full compliance by

the insured with all the foregoing requirements. One of these requirements demanded the insured to furnish proofs of loss within sixty days from the date of the fire. At the time this complaint was filed the insured had not complied with this requirement of the contract, and the sixty days had long since gone by.

"The court instructed the jury as follows: 'The matter for the jury to determine in settling the question as to the right of the defendant to claim the loss of the insurance upon the ground that the proofs were not presented is, Were these proofs presented within a reasonable time, the reasonableness of the time to be determined by all the facts and circumstances of the case? If you find that under these facts and circumstances proofs were made within a reasonable time to the insurance company, then it is your duty generally to find in favor of the plaintiffs.' In view of what has been said, this instruction is wrong."

The *White* case was followed by Judge Van Fleet in the District Court, Northern District of California, in the case of *San Francisco Savings Union v. Western Assur. Co. of Toronto,* 157 Fed. 695, where the court held, copying the syllabus:

"Insurance—Conditions in Policy—Time for Proving Loss.

"Where an insurance contract contained a condition printed on the back of the policy that 'no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the

foregoing requirements,' and among such requirements was one that proof of loss should 'be made within sixty days after the fire unless such time is extended in writing,' a complaint on the policy does not state a cause of action which shows on its face that proof of loss was not made until six months after the fire, and alleges no extension of time nor waiver."

The Court said, on page 697:

"These principles are applicable alike to all the conditions of the contract, whether those conditions affect the risk itself or relate merely to the mode of establishing the loss; and, applying them here, it is obvious that the limitation of time in the clause as to the making of proof of loss is as essential to the integrity of the contract the parties have made as the requirement that proof be made at all; and that, if that feature may be disregarded, the entire clause may with equal right be ignored, something which no court thus far has ever undertaken to hold."

And on page 698 referred to the *White* case as follows:

"The Supreme Court of the state of California, in a quite recent case (White v. Home Mutual Ins. Co., 128 Cal. 131, 135, 60 Pac. 666) involving the same provision, where proof of loss was not made until some four months after the fire, reached the same conclusion, and in a well-reasoned opinion holds that the provision is a condition precedent, the performance of which by the plaintiff is indispensable to the right of recovery, that by the language employed time is intended to be of the essence of the contract, and that there is no right in the court to dispense with the condition or excuse the nonperformance of it."

The Court then quotes from the *White* case the portions we have quoted above.

The *White* case was followed in the following cases and is unquestionably the rule in California:

Seccombe v. Glens Falls Insurance Co., 45 Cal. App. 611, 188 Pac. 305;

Kohner v. National Surety Co., 105 Cal. App. 430, 287 Pac. 510;

Harris v. North British & Mercantitle Ins. Co., Ltd., 30 F. 2d 94 (5th C. C. A.).

There is no question or controversy on the proposition that Appellees did not perform these conditions precedent on their part agreed to be performed. The complaint alleges it and the Court so found. The allegations of the complaint and the exhibits attached thereto conclusively bear this out. [Par. X, Tr. p. 34, Ex. A, Tr. p. 18.]

There is no direct evidence of any waiver of the performance of these conditions. The trial court implied a waiver from an implied denial of liability by Appellant's local agent prior to the expiration of the time for giving notice and furnishing proofs of loss. The evidence regarding this implied waiver was received over Appellant's objections that no proof of authority on the part of the agent to deny liability was shown and further that the undisputed testimony showed that there had been no denial of liability for loss by explosion in that no one of the parties interested had even considered the happening as an explosion. [Tr. p. 65.]

The whole matter of this alleged waiver rests on certain conversations had with a Mr. Avery, the local agent of

Appellant who had executed and delivered the policy to Appellees, and the evidence was received over Appellant's objection that no authority had been shown and none was shown of Mr. Avery to waive any of the conditions of the policy and no waiver was shown.

To properly present this phase, we must quote all of the material testimony regarding these conversations.

The first of the conversations with the Agent was testified to by Mr. Kenneth S. Wing, Appellees' architect, who with his partner jointly owned and occupied an office building with Mr. Avery. [Tr. p. 137, fol. 363.]

Mr. Wing, called by Appellees, after testifying to having received from Appellees the notice of the breaking of the pipe, proceeded as follows:

> "Q. Now following the occurrence of this break in the line, did you have any conversation with Mr. Robert Avery? A. Following the break of the line?
>
> Q. Yes. A. Yes, I did, within a very few days after that. I discussed it with him.
>
> Q. And who is Mr. Robert Avery? A. He is one of the partners—in fact, I discussed it with both Hammond and Avery who are the firm of Hammond & Avery Insurance Agents, with whom the Doctor placed the policy.
>
> Q. And who were present when you had this conversation with Mr. Avery? A. Mr. Hammond and Mr. Avery.
>
> Q. Both of them were there? A. Yes, sir.
>
> Q. And what was said?
>
> Mr. Davis: Again I make my original objection that conversation had with these gentlemen would not be binding upon the company unless the agent's authority has first been shown.

The Court: That is one of the questions we have to settle here.

Mr. McCarthy: Yes, your Honor, that is right.

The Court: It will be admitted subject to objection to strike.

Mr. McCarthy: Thank you, your Honor.

Mr. Davis: Same objection I made yesterday, that your Honor reserved ruling on.

Q. (By Mr. McCarthy): Will you state that conversation?

A. I asked them if their comprehensive clause, as I understood it, would not cover this and they said that they would check and they talked, as I remember it, with the Los Angeles office.

Mr. Davis: I object to that.

The Court: What did they tell you?

The Witness: They said that it did not.

The Court: Did they say they had checked with Los Angeles?

The Witness: Yes, sir.

Q. (By Mr. McCarthy): Now, did you tell them what happened? A. Oh, yes.

Q. Describe what you told them.

A. Well, I told them that the water line had broken under the building and caused a considerable amount of water to go underneath the building, necessarily swelling the adobe, which is common procedure.

The Court: Did you tell what caused the break in the line?

The Witness: Yes, I told them, which I felt at that time, that it was the thermostat on the water heater. I think that was the beginning point of all of it.

Q. (By Mr. McCarthy): You told them about the failure of the thermostat? A. Yes.

Q. Did you say anything about the formation of steam? A. No, I did not. I did not get into any technical discussion with them to that extent. I told them the pressure was built up due to the fact that the thermostat didn't release." [Tr. pp. 111-113, fols. 216-218.]

Appellant Esli Daniels testified, over Appellant's objection [Tr. p. 65], to conversation had with Robert Avery within a week after the occurrence as follows:

"A. It was a telephone conversation.

Q. And what was said? A. Well, I called him up and I said: 'Bob, I think that I had better increase my insurance, seeing what has happened out here. I am afraid the place is going to burn down next,' and I said—well, I started—first I started to tell him what had happened.

The Court: What did you tell him?

The Witness: I told him that the water heater had stuck and that the damage is very severe and he said: 'Well, I know about that,' he said, 'because Kenneth Wing had been in to see me and see whether you are covered on this,' and I said: 'Well, I am not covered.' He said: 'No.' He said: 'No, your policy does not cover anything like that,' and then is when I said: 'Well, I had better take out more insurance anyway because I am afraid the place is going to burn down next.'

Q. And did you subsequently take out— A. Yes, sir, I doubled the policy.

Q. And did you believe what Mr. Avery told you, that it was not covered by the policy? A. Surely.

Q. And because of that you refrained from filing proof of loss under the policy? A. Yes.

Q. When did you first discover that it was covered by the policy? A. Well, it was several months later. I don't know the exact date. It was quite a while later that Bob Avery or Clay Hammond, or one of the two, wrote us a note to the effect that there had been a similar case to ours and it was just a recent one and that the insured had been able to collect. And he said—I think he said: 'I think you are covered.'

Q. But that was more than 60 days after the occurrence? A. Yes, that was considerable after 60 days.

The Court: Then what did you do?

The Witness: Then I immediately got to work on the thing and called Mr. Ekdale or talked to him about it and he seemed—

The Court: Then did you file your claim, your proof of loss?

The Witness: Very shortly after that, yes, sir.

The Court: Where did you get your form for the proof of loss?

The Witness: Mr. McCarthy took care of that for me.

Q. (By Mr. McCarthy): And that was filed with the Hartford Fire Insurance Company in San Francisco? A. Yes, sir." [Tr. pp. 67-68, fols. 29-30.]

Mr. Robert Avery, again over Appellant's objections, testified as follows:

"Q. (By Mr. McCarthy): What is your occupation, Mr. Avery? A. Insurance agent.

Q. And you are agent for the Hartford Fire Insurance Company? A. Yes.

Q. Now, where is your place of business? A. No. 30 Linden in Long Beach.

Q. And are you acquainted with Dr. Daniels, the plaintiff in this case? A. Yes.

Q. And with Kenneth Wing, the architect? A. Yes.

Q. Mr. Wing's offices are adjacent to yours, in the same building? A. They are upstairs in the same building.

Q. Now, inviting your attention to a date within a few days after December 18, 1949, did you have a conversation with Mr. Kenneth Wing regarding the Daniels' house? A. Yes, I did.

Q. And who were present? A. I think I was the only one present at that time.

Q. And what was said?

Mr. Davis: Of course I am making the same objection as I did before.

The Court: Same ruling.

The Witness: Mr. Wing told me of the damage caused to Dr. Daniels' house as a result of failure of some of the plumbing, resulting in water damage.

Q. (By Mr. McCarthy): Now, just what did he tell you? Did he say any more than that? A. Well, he said that he thought that it was a condition in the thermostat at that time as I remember it.

Q. And what did he say about the thermostat? A. Well, as I recall the conversation he said that the thermostat had apparently given way to pressure and broken, permitting the water to seep in and under the house.

Q. And what else was said in that conversation? A. The conversation was largely as to the extent

of the damage to the house and some query on his part as to whether Dr. Daniels' fire insurance policy would cover the damage.

Q. Now, were you familiar with Dr. Daniels' fire insurance policy? A. Yes.

Q. And what was your reply? A. The reply was that he did not have coverage for water damage.

Q. And was anything further said about it? A. No, I don't believe so.

Q. Now, did you make any report to anyone connected with the Hartford Fire Insurance Company regarding this matter? A. Not directly at that particular time. At a later date, oh, within two weeks it was discussed rather thoroughly with John Kilgore, who was a special agent for the Hartford Fire Insurance Company and it was also discussed at some length with Russell Thomas, who was an adjuster for the Hartford Accident and Indemnity Company and also with Mr. Frank Homer, who was a special agent for the Hartford Accident and Indemnity Company.

Q. Now, did you at or about the same date have any conversation with Dr. Daniels? A. Yes. Dr. Daniels called me on the phone to inquire if he had coverage for water damage and started to tell me of the extent of the damage, and I told him that I had already discussed it quite thoroughly with Kenneth Wing, the architect, and I gave him the same answer, that he did not have coverage for water damage.

Mr. McCarthy: You may cross-examine.

Q. (By Mr. Davis): When was that that Dr. Daniels called you? A. As I recall it was the 21st of December. The reason that date fixes itself in

my memory was because my mother's brother passed away on that date in Missouri.

Q. Are you and Mr. Wing—you and Mr. Wing are engaged in some enterprises together? A. The only enterprise we are engaged in is that Mr. Wing and myself and Mr. Hammond each own a third interest in the building in which we are located.

Q. Dr. Daniels is not interested with you? A. No, sir.

Q. You are a friend of Dr. Daniels? A. Yes, sir.

Q. And have been procuring his insurance for him over a period of time? A. That is right.

Mr. Davis: I think that is all, Mr. Avery.

The Court: Just a moment. I believe the architect said something about you having made some inquiry over the telephone as to whether this was covered. Do you recall anything about that? Did you check with somebody to find out whether he was covered or not?

The Witness: I don't believe that I did, sir. The question that Dr. Daniels and Mr. Wing asked us at the time as whether or not the policy covered water damage and it definitely does not as water damage.

The Court: Did he tell you in substance—well, he told you in substance and effect the break in the pipe was caused by the excessive heat from the water heater?

The Witness: That is right.

The Court: But nevertheless you gave him that answer and you knew that he was claiming it was a break which came as a result of the thermostat failing to work and not the hot water heater itself?

The Witness: That is right.

The Court: That is, you had that information?

The Witness: That is right.

The Court: That is all.

Q. (By Mr. Davis): As I understood, you got the impression from Mr. Wing that the thermostat had failed and the water had leaked under the house? A. That is correct.

Q. You didn't have any knowledge that there was a break of the pipe under the house? A. No, sir.

Q. At that time? A. No, sir.

The Court: Another question. Afterwards did you call Mr. Daniels' attention to the fact that he may have been covered by the policy?

The Witness: Yes, we did. We subscribed to a service called the 'F. C. & S. Bulletins' which provide us with monthly written reports of the changes in various types of insurance and also gives résumés of cases which have been decided on court points, and in the April issue of that service was a résumé of a case which was very similar to Dr. Daniels' case and when he had read that and discussed it we called Dr. Daniels and told him of the circumstances and suggested that he should file a claim as a result of that.

The Court: And did he file a claim?

The Witness: That is correct.

The Court: That is all.

Q. (By Mr. Davis): It was after that that he notified the Hartford Fire Insurance Company of the claim? A. That is right.

The Court: Are you what is called a general insurance agent?

The Witness: Yes, sir.

The Court: Representing many fire insurance companies?

The Witness: Yes, sir.

Mr. McCarthy: One further question.

Redirect Examination.

Q. (By Mr. McCarthy): As a part of your duty has the Hartford Fire Insurance Company instructed you to report to it any claims of which you acquire knowledge? A. Yes, sir." [Tr. pp. 134-139.]

Mr. Roy O. Elmore testified that he was Southern California Manager for Appellant and as such that all losses and underwriting was under his control and jurisdiction, and that the first time that this alleged loss, or the subject of the lawsuit, was reported to him or his office was on April 19, 1950, when it was reported by their agents at Long Beach, Hamman and Avery, to his claims department. [Tr. p. 120.]

On the foregoing testimony the trial court concluded that the Appellant had waived the performance of the conditions precedent by denying liability before the time for performance arrived.

That this was error is obvious. All of the testimony went in over the objection of Appellant that no authority in Mr. Avery to deny liability or waive the conditions had been shown, and furthermore there was absolutely no testimony that any claim to be denied had been made, or that Mr. Avery, the agent, knew of any claim for direct loss by explosion. In fact, none of the parties

conceived that there was an explosion until the *Olds* case was brought to their attention and they conjured up an explosion thereafter.

The only authority shown in Mr. Avery was that he was the agent who had countersigned and delivered the policy and that he was instructed by the Appellant to report all losses to it. The Court assumed his authority by reason of these facts.

It is fundamental that one seeking to hold a principal through the acts of his agent has the burden of showing not only that the party was an agent, but also the scope and extent of his authority.

This rule is epitomized in the following quotation from *Hill v. Citizens National Trust & Savings Bank,* 9 Cal. 2d 172, 69 Pac. 853, as follows:

> "A third person, such as appellant, is not compelled to deal with an agent, but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency, second edition, section 743, page 527, as follows: 'An assumption of authority to act as agents for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to "stop, look and listen." It is therefor declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a *general* or *special* one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency *but the nature and extent of the authority,* and in case either is contro-

verted, the burden of proof is upon them to establish it.'" (*Ernst v. Searle,* 218 Cal. 233, 240, 22 P. 2d 715, 717.) (Italics ours.)

And, of course, the general rules of agency is as applicable to insurance as to any other matter.

14 *Cal. Jur.* 454.

It is said in 45 *Corpus Juris Secundum* 624:

"An insurance company may be estopped to deny liability, or a ground for forfeiture or avoidance of the policy may be waived, by the acts and statements of an *authorized* officer or agent of the company, but the acts constituting a waiver on estoppel must be those of an officer or agent whose acts under the circumstances are binding on the company." (Citing *Alexander v. General Ins. Co.,* 22 Fed. Supp. 157 (S. D. Calif.); *Rice v. Calif. Western States Life Ins. Co.,* 21 Cal. App. 2d 660, 70 P. 2d 516; *Kugler v. I. A. C. of State of Calif.,* 63 Cal. App. 308, 218 Pac. 472.)

And in 45 *Corpus Juris Secundum* 626:

"But to bind the company the acts or representations must have been made by a person acting as an agent of the company within the real or apparent scope of his authority. *It is not every agent of insurer, however, who may waive important* contract provisions."

And in 46 *Corpus Juris Secundum* 284:

"Such waiver cannot be made by an unauthorized agent."

There was absolutely no testimony of any direct authority in Mr. Avery to deny liability or waive the terms of the policy and the whole testimony shows that he did not do so or attempt to do so. He was never asked to accept or deny a claim or to take any action in reference to the loss. He was not advised that there was any indicia or claim of explosion and the most that was asked of him was an interpretation of the policy and, as Appellee Esli Daniels says, to find out whether his fire policy covered this loss. It was not competent for Mr. Avery to attempt to interpret the contract contrary to its express conditions.

See:

United Pacific Insurance Co. v. Northwestern National Ins. Co., 185 F. 2d 443.

The Appellees, having their policy contract, were presumed to know its unambiguous terms and cannot be heard to say that they did not read it or understand it.

Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51;

Kahn v. Royal Indemnity Co., 39 Cal. App. 180, 178 Pac. 331.

Since there was no proof of any express authority in Mr. Avery, what was said in the case of *Blair v. National Reserve Ins. Co.*, 293 Mass. 86, 199 N. E. 337, becomes particularly pertinent. The Court said:

> "And when the assertion is made that a condition in a policy inserted for the company's benefit has been waived or destroyed by the company in some way other than that required by the policy, it becomes necessary to show that the acting agent had author-

> ity to bind the company in ways contrary to those contemplated by the contract. As the probabilities will be against such grant of authority, definite proof will be required. Authority to make the original contract or to waive the condition in the manner prescribed therein is not enough. If this were not so, the particular requirements of the contract would become meaningless. Some further and additional delegation of authority derived from the fountain head of corporate power must be shown broad enough to include the abrogation of the condition in a manner excluded by the very terms of the contract itself." (Citing many cases including U. S. Supreme Court.)

In *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 61 Pac. 670, the Court said:

> "It is also said that whether a particular agent has power to waive conditions is a question of fact. Plaintiffs offered no evidence as to the authority of Hawes except the policy, which expressly denied to him the authority to modify the contract. The burden was upon plaintiffs. The title 'general manager,' for a specified territory, does not establish the particular authority required, especially after this express limitation."

Since there was shown no actual authority on the part of Mr. Avery to waive the conditions precedent in the policy, resort was had to an implied authority arising from the fact that he was the local agent of the Appellant and authorized to countersign and deliver policies. We have found no cases holding that such an authority implies authority to act after a loss and to waive conditions precedent to be performed by the Assured, but on the contrary have found many cases holding such implied authority does not exist.

See:

Collins v. Home Ins. Co. of New York, 167 Atl. 621 (Pa.);

Fernando v. Milwaukee Mechanics Ins. Co., 142 Pac. 693 (Wash.);

Hessler v. North River Ins. Co., 207 N. Y. Supp. 529;

Bowlin v. Hekla Fire Ins. Co., 31 N. W. 859, 36 Minn. 433;

Mitchell v. Western Fire Ins. Co., 261 N. W. 300;

Graham v. Niagara Fire Ins. Co., 32 S. E. 579 (Ga.);

Barry & Finan Lbr. Co. v. Citizens Ins. Co., 98 N. W. 761 (Mich.);

Ermentrout v. Girard Fire & Marine Ins. Co., 65 N. W. 635 (Minn.);

Harrison v. Hartford Fire Ins. Co., 59 Fed. 732;

Urbaniak v. Firemen's Ins. Co., 116 N. E. 413, 121 Mass. 439.

Certainly the most that can be said here was that Mr. Avery, the Appellee, and Mr. Wing, all personal friends and associates, discussed the possibility of trying to bring Appellees' misfortune within the terms of some insurance policy and obviously Mr. Avery was not speaking or presuming to speak or to be acting for or in behalf of the Appellant, but merely engaging in an academic discussion with the Appellee and Mr. Wing, a stranger to the contract.

It is fundamental that to bind a principal, an agent must be engaged at the time in and about the business of the principal and Mr. Avery certainly was not doing so,

either in his discussions or in his later encouragement of the Appellee to try to bring his situation within the pervue of the *Olds Seed Company* case.

See:

Palo Alto Association v. First National Bank, 33 Cal. App. 214, 224, 164 Pac. 1124;

Wittenbrock v. J. A. Parker, et al., 102 Cal. 93, 101, 36 Pac. 374;

Renton Holmes & Co. v. George Monnier, 77 Cal. 449, 453, 19 Pac. 820.

Appellant respectfully submits that the undisputed evidence establishes conclusively that Appellees suffered no direct loss by explosion to the property described in Appellant's policy and that Appellees failed to perform the conditions of the contract of insurance upon their part agreed to be performed and should not recover, and that the judgment of the District Court should be reversed.

Respectfully submitted,

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